

I. NEEL CHATTERJEE (STATE BAR NO. 173985)  
nchatterjee@orrick.com  
MONTE M.F. COOPER (STATE BAR NO. 196746)  
mcooper@orrick.com  
THERESA A. SUTTON (STATE BAR NO. 211857)  
tsutton@orrick.com  
MORVARID METANAT (STATE BAR NO. 268228)  
mmetanat@orrick.com  
ORRICK, HERRINGTON & SUTCLIFFE LLP  
1000 Marsh Road  
Menlo Park, CA 94025  
Telephone: 650-614-7400  
Facsimile: 650-614-7401

Attorneys for Plaintiff  
FACEBOOK, INC.

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA  
SAN FRANCISCO DIVISION

FACEBOOK, INC.,

Plaintiff,

v.

POWER VENTURES, INC. a Cayman Island  
Corporation; STEVE VACHANI, an  
individual; DOE 1, d/b/a POWER.COM,  
DOES 2-25, inclusive,

Defendants.

Case No. 5:08-cv-05780 JW

**PLAINTIFF FACEBOOK INC.'S  
SECOND MOTION TO ENLARGE  
TIME PURSUANT TO CIVIL LOCAL  
RULES 6-3 AND 16-2**

Judge: Hon. James Ware  
Courtroom: 15, 18th Floor

1 **I. INTRODUCTION**

2 Facebook seeks an order pursuant to Civil Local Rules 6-3 and 16-12 modifying for the  
 3 second time the Case Management Order (Dkt. Nos. 92 & 116), and continuing by 60 days all  
 4 deadlines in the case – including the deadline for expert disclosures. The requested continuance  
 5 is necessary to ensure that Facebook and its experts have sufficient time to obtain and review all  
 6 relevant discovery from Defendants, including source code that the Court contemplated would be  
 7 produced weeks ago. This Court previously granted for “good cause” Facebook’s first Motion to  
 8 Enlarge time (Dkt. No. 111) based upon Facebook’s need to obtain source code from Defendants.  
 9 Despite this Order, Defendants refused to produce the source code until six weeks later, after  
 10 Facebook successfully moved to compel its production. See Dkt. No. 124, 126-127. Even then,  
 11 Defendants’ source code production was incomplete.

12 Defendants’ unwarranted delay and the incomplete production of source code has  
 13 prejudiced Facebook, and should be remedied. Moreover, Defendants refuse to cooperate with  
 14 Facebook in resolving other critical discovery issues, and to date have produced only 13  
 15 documents. Such dilatory tactics have denied Facebook an opportunity to meaningfully prepare  
 16 its expert reports by the existing deadline of September 26, 2001, or its opposition to Defendants’  
 17 pending Motion for Summary Judgment (Dkt. No. 98), which is currently due on September 12,  
 18 2011. A 60-day continuance of these and all other pre-trial deadlines thus is necessary.

19 **II. STATEMENT OF RELEVANT FACTS**

20 This case involves claims for violation of the CAN-SPAM Act, the Computer Fraud and  
 21 Abuse Act, and California Penal Code § 502(c). It stems from Defendants’ knowing and  
 22 unauthorized access to Facebook’s protected computer network, impermissible storage and use of  
 23 Facebook users’ login data, and unauthorized use of Facebook user accounts to send unsolicited  
 24 commercial messages designed to lure Facebook users to register at www.power.com.

25 On October 22, 2010, Facebook served Defendant Power Ventures, Inc. with its First Set  
 26 of Requests for Production of Documents and First Set of Interrogatories. Declaration of  
 27 Morvarid Metanat (“Metanat Decl.”), ¶ 2. Nearly two months after serving its responses, Power  
 28 produced 13 documents in response to Facebook’s 50 document requests. *Id.* Meanwhile,

1 Power refused to produce a copy of its source code in response to Request No. 3. *Id.* Then, on  
2 June 2 and 3, 2011, Facebook served defendant Vachani and Power with its first and second sets  
3 of document requests, respectively. *Id.* ¶ 3. However, Defendants produced no documents in  
4 response, and continued to refuse to produce source code. *Id.*

5 In light of these discovery deficiencies, the parties filed a Discovery Dispute Joint Report  
6 #1 with Magistrate Judge Lloyd on July 7, 2011, outlining their positions with respect to  
7 production of source code. Dkt. No. 113. On July 6, Facebook also filed a Motion to Enlarge  
8 Time, which sought a 60 day extension of deadlines in order to accommodate its need for review  
9 of the un-produced source code. Dkt. No. 111. Defendants opposed, but in doing so did not deny  
10 that Facebook needed Defendants' source code to respond to the pending motion for summary  
11 judgment. Dkt. No. 114, at 4. Accordingly, on July 14, this Court entered an order granting  
12 Facebook's motion for a continuance, and found "good cause" to extend all existing discovery  
13 and pre-trial deadlines by 60 days. Dkt. No. 116. The Court noted that "[i]n their Opposition,  
14 Defendants d[id] not contend that they have produced source code or other documents requested  
15 by Plaintiff." *Id.* at 2. The Order re-set the deadlines for Facebook to oppose the Defendants'  
16 pending motion (Dkt. No. 98) to September 12, 2011, and re-set the deadlines for expert  
17 disclosures to September 26, 2011. *Id.* Discovery currently closes on November 28, 2011. *Id.*

18 As a result of the Order re-setting deadlines, Facebook's counsel immediately contacted  
19 Defendants counsel to ask that they stipulate to production of the source code, given the Court's  
20 finding of good cause for a continuance based on Facebook's stated need of the software.  
21 Metanat Decl. Ex. A. Defendants refused to so stipulate, resulting in the parties filing a Joint  
22 Stipulation with this Court outlining the dispute. *See* Dkt. No. 119.

23 After the Court then set deadlines for briefing of the issues (Dkt. No. 122), Facebook  
24 moved to compel Defendants to produce the source code, as well as related documents. *See* Dkt.  
25 124. Remarkably, Defendants then filed a one paragraph response to Facebook's Motion in  
26 which they at last agreed to produce the source code. Dkt. No. 126. The Court on August 18,  
27 2011 immediately granted Facebook's Motion to Compel, and ordered Defendants to produce "all  
28 source code and associated documentation related to the website www.power.com' insofar as that

source code was used for a number of specified purposes” that were referenced in Facebook’s Motion to Compel. *See* Dkt. No. 127. Counsel for Facebook immediately requested that Defendants confirm that they would produce all source code required by the August 17, 2011 Order. Metanat Decl. Ex. B. On August 23, 2011, Facebook also requested that Power stipulate to a modification to the Case Management Order. *Id.* Ex. C. However, Power refused. *Id.*

Facebook’s review of Defendant’s source code review began on August 25. *Id.* ¶ 7. Facebook’s expert immediately determined that the source code production was incomplete. For example, Defendants production lacks the www.power.com website source code, the PowerScript applications and functions, or source code files, associated with Facebook, and the Defendants’ critical MSSQL database. *Id.* Ex. D. These materials are necessary for a thorough analysis of the functionality of Defendants’ website, the absence of which significantly prejudices Facebook.

Meanwhile, based on the Defendants’ paltry production of 13 documents, and further based on the fact that Power’s CEO Steve Vachani admitted in a deposition that he had not searched all sources for relevant materials, Facebook on August 22, 2011 filed a Motion to Compel Defendants to perform a thorough search for missing responsive documents. *See* Dkt. No. 129. Metaneat Decl. ¶ 8. That motion is is set for hearing on October 24. Facebook also is currently preparing a third motion to compel requesting that Defendants produce, amongst other things, documents related to Power’s use of IP addresses and proxy servers to access the Facebook website. *Id.* This information is relevant to the pending summary judgment motion. *Id.* Facebook anticipates filing the motion by September 1. *Id.*

### III. ARGUMENT

#### A. Good Cause Exists To Modify The Scheduling Order

Given Defendants’ delays in producing source code and other relevant information after July 14, good cause exists for a 60-day continuance of all scheduling deadlines. *See* Fed. R. Civ. P. 16(b)(4); N.D. Civ. Local. R. 6-3 & 16-2. That is so, because Rule 16(b)’s “good cause” standard permits modification of a pretrial schedule if the pretrial schedule “cannot reasonably be met despite the diligence of the party seeking the extension.” Fed. R. Civ. P. 16 advisory committee’s notes (1983 amendment); *Johnson v. Mammoth Recreations*, 975 F.2d 604, 609 (9th

1 Cir. Cal. 1992). That clearly is the case here as Facebook has been diligent in seeking discovery.

2 The Defendants' continuous refusal to cooperate in discovery – particularly the  
3 unreasonable six week delay in producing source code after July 14 – makes it nearly impossible  
4 for Facebook to meet the current deadline of September 26 for preparing expert reports. For  
5 instance, because of Power's initial baseless refusal to produce its source code, Facebook's  
6 experts are only just now able to review and analyze the relevant code and materials to prepare  
7 their reports. Even then, it has just been discovered from an initial review of the code that these  
8 materials are incomplete. Metanat Decl. Ex. D. Regardless of when Defendants supplement  
9 their production, Facebook will be delayed further in preparing expert reports. Moreover,  
10 Facebook may be forced to file yet another motion to compel. Compounding these problems,  
11 portions of the source code are written in Portuguese. Accordingly, Facebook may need to hire a  
12 translator, which will prolong the review process even further.

13 In addition, Power's inadequate search for documents responsive to Facebook's discovery  
14 requests is the subject of a motion to compel currently pending before the Court, and will not be  
15 heard until October 24. Depending on the outcome of this motion, Facebook may be entitled to  
16 additional materials—materials that may potentially have a significant impact on Facebook's  
17 expert analysis, but will not otherwise be available by September 26.

18 Facebook also intends on or before September 1 to file a motion to compel Power's  
19 production and supplemental responses to Facebook's First and Second Requests for Production  
20 and Interrogatory Requests. Based on Steve Vachani's recent deposition testimony, Facebook  
21 believes that Defendants are withholding pertinent documents related to their efforts to solicit  
22 Facebook users to join www.power.com, and to avoid Facebook's efforts to block IP addresses  
23 for that website. Such materials are highly relevant to Facebook's claims under the CFAA, CAN-  
24 SPAM Act, and Penal Code Section 502. However, these materials also will not be produced  
25 prior to September 26.

26 Without all this information, Facebook will be unable to adequately prepare expert reports  
27 by the current deadline. Defendants should not be permitted to prevent Facebook from meeting  
28 the case management schedule by delaying and refusing to cooperate. For these reasons,

Facebook respectfully requests an order modifying the Case Management schedule by 60 days.

**B. Good Cause Exists To Enlarge Time To Respond To Power's Motion For Summary Judgment**

Facebook also seeks a continuance of the deadline for filing its Opposition to Defendants' Motion for Summary Judgment until at least November 11, 2011. In their motion, Defendants argue that they did not initiate the transmission of email messages that are in violation of the CAN-SPAM Act. *See* Dkt. No. 98 at 12-13. They also argue that they "did not circumvent any technical barriers" in violation of the CFAA and Penal Code § 502(c). *Id.* at 16-19. Yet, much of the discovery in dispute relates to the process by which Defendants accessed or allowed Power's users to access the Facebook website and services (such as sending email to users). While Defendants' source code and related materials may provide some of the answers Facebook seeks, that production is incomplete, and review only began on August 25. Metanat Decl. Ex. D. Facebook's deadline to file its opposition to Power's Motion for Summary Judgment is currently September 12, 2011—less than three weeks away. The current deadline does not provide Facebook's experts sufficient opportunity to analyze the source code and related documents, or to prepare an opposition – particularly since Facebook has not received all of the code.<sup>1</sup>

Moreover, Facebook has not received documents related to Defendants' use of proxy servers to access Facebook's website, and to later circumvent Facebook's implemented IP blocks. This information is crucial to Facebook's CFAA and Penal Code Section 502 claims. Defendants' refusal to produce this information has forced Facebook to file a third motion to compel by September 1. Facebook should not through Defendants' dilatory discovery be prevented from adequately preparing arguments in opposition to Defendants' Motion for Summary Judgment. A continuance of the September 12 deadline thus is necessary.

**IV. CONCLUSION**

Facebook respectfully requests an order modifying the July 14, 2011 Scheduling Order by 60 days, and for also enlarging by 60 days all deadlines associated with Defendants' Motion for Summary Judgment.

---

<sup>1</sup> Facebook anticipates filing a motion pursuant to Fed. R. Civ. P. 56(d) to address these problems.

1  
2 Dated: August 26, 2011

ORRICK, HERRINGTON & SUTCLIFFE LLP

3  
4 /s/ Morvarid Metanat /s/

5 Morvarid Metanat  
6 Attorneys for Plaintiff  
7 FACEBOOK, INC.  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28